No. 83-245 and No. 83-291

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PENSION BENEFIT GUARANTY CORPORATION, Appellant,

v.

R. A. GRAY & COMPANY, Appellee,

and

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND, Appellant,

v.

R. A. GRAY & COMPANY, Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPELLEE'S MOTION TO AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases Cited

Constitutions, Statutes and Rules

Other Authorities

No. 83-245 and No. 83-291

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Appellee R. A. Gray & Company, pursuant to Rule 16.1, Rules of the Supreme Court of the United States, moves the court for an order affirming the decision of the United States Court of Appeals for the Ninth Circuit, issued on May 20, 1983 and reported at 705 F.2d 1502, insofar as that decision holds that application of the

withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208 *et seq.*, to employers who withdrew from multiemployer pension plans prior to enactment of the law violates the employers' due process rights under the Fifth Amendment to the United States Constitution. This motion is made on the ground that the decision of the Court of Appeals applied proper principles of law and was clearly correct and should therefore be affirmed without need to set the case for argument.

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ARGUMENT IN SUPPORT OF APPELLEE'S

MOTION TO AFFIRM

Introduction

On February 14, 1980, R. A. Gray ("Gray") gave notice of termination of its collective bargaining agreement, effective June 1, 1980. Termination of the collective bargaining agreement constituted a withdrawal by Gray from the multiemployer

pension plan to which it had contributed nearly $400,000 during its 15-year membership in the plan. On September 26, 1980, the President signed into law the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") which, by its terms, imposed a mandatory additional liability on employers who had withdrawn from such plans between April 29, 1980 and the date of the law's enactment. 29 U.S.C. § 1461(e)(2)(A). Gray's withdrawal liability was later determined to amount to $201,359. The trust document governing the plan provided:

> ". . . liability of any individual employer to the Fund, or with respect to the Plan, shall be limited to the contributions required by the Collective Bargaining Agreement . . . ."

Gray had made all required contributions.

The United States Court of Appeals for the Ninth Circuit upheld Gray's challenge to the constitutionality of the retroactive feature of MPPAA, reversing a contrary

decision by the United States District Court for the District of Oregon. The Ninth Circuit recognized that the MPPAA

> ". . . comes to the courts with a presumption of constitutionality and that the burden is on the plaintiffs to establish that Congress acted in an arbitrary and irrational way . . . ." 705 F.2d at 1510.

It also recognized that even a retroactive law is constitutionally valid unless the retroactive effects

> ". . . are so wholly unexpected and disruptive that harsh and oppressive consequences follow . . .." 705 F.2d at 1510.

Those standards for review of retroactive legislation under the Due Process Clause of the Fifth Amendment have been specifically approved by this court's decisions. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 at n. 13 (1977), citing *Welch v. Henry*, 305 U.S. 134, 147, *reh. den.* 305 U.S. 675 (1938); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

The Court of Appeals correctly concluded that MPPAA's retroactive creation of withdrawal liability was both disruptive and harsh or oppressive, and that Congress had acted arbitrarily and irrationally in including that provision in the Act.[1] The Court of Appeals' determination that the retroactive effective date of the Act is invalid should be summarily affirmed.

1. This Court's Decisions Do Not Support Retroactive Creation of Withdrawal Liability.

On occasion, this court has approved retroactive changes in certain tax laws. *See, e.g., United States v. Darusmont*, 449 U.S. 292 (1981); *Welch v. Henry*, 305 U.S.

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[1]The Ninth Circuit employed the four-factor retroactivity analysis adopted by the Seventh Circuit in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd* 446 U.S. 359, *reh. den.* 448 U.S. 908 (1980). The *Nachman* court, in adopting that analysis, identified factors considered by this court in reviewing retroactivity challenges to regulatory legislation. 592 F.2d at 960.

134, *reh den.* 305 U.S. 675 (1938); *United States v. Hudson*, 299 U.S. 498 (1937); *Milliken v. United States*, 283 U.S. 15 (1931). It has, however, distinguished its approval of such changes from its holdings that changes in gift tax laws may not constitutionally be applied to completed gifts which were not taxable transactions when made. *Milliken v. United States*, *supra*, 283 U.S. at 21. It has never approved the retroactive creation of an entirely new liability comparable to that imposed by the MPPAA.

Nor do the decisions of the Second Circuit and the Court of Claims, discussed at pages 12 and 13 of PBGC's Jurisdictional Statement, conflict with the decision of the Ninth Circuit in this case. *United States v. Binder*, 453 F.2d 805 (2d Cir. 1971), *cert. den.* 407 U.S. 920 (1972), affirms a criminal conviction for conduct which occurred after the law's enactment.

453 F.2d at 808. In *First National Bank in Dallas v. United States*, 420 F.2d 725 (Ct. Cl.), *cert. den.* 398 U.S. 950 (1970), the holding is expressly limited to the situation before the court. In that case the government had helped to provide personal notice to potentially affected individuals that securities transactions they contemplated could become taxable. 420 F.2d at 726-727 and 729 at n. 6. Moreover, the taxpayer could have obtained the same security from a different seller in an exempt transaction. 420 F.2d at 727 and 731.

This case is totally different. It involves after-the-fact imposition of liability based on completed past transactions which may not even have

been voluntary,[2] and without any attempt whatsoever to provide individual notice to persons contemplating behavior that might later become the basis for liability.

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[2]Withdrawal can be forced upon an unwilling employer. If any of the following occurs, the employer may not enter a renewal collective bargaining agreement: (1) the employer learns of objective evidence that the union no longer represents a majority of the employees, *N.L.R.B. v. Midtown Service Co.*, 425 F.2d 665 (2d Cir. 1970); (2) the employees petition for and have an election confirming a lack of majority status, 29 U.S.C. § 159(c)(1)(A)(ii); or (3) the employer files a petition requesting confirmation or denial through election of a majority status after receiving evidence disputing the fact of continued majority support, 29 U.S.C. § 159(c)(1)(B), *United States Gypsum Co.*, 157 N.L.R.B. 652, 61 L.R.R.M. 1384 (1966). An employer may not interfere in those procedures without committing an unfair labor practice. 29 U.S.C. § 158(a).

2. MPPAA's Retroactive Effective Date Is Clearly Disruptive of Employers' Reasonable Expectations and Does Not Protect Any Reasonable Expectations of Others.

A multiemployer pension plan is one which is designed for membership which changes over time as some employers withdraw from the plan and others join. Employers' contributions are made to a trust which is administered by trustees who owe fiduciary duties to the employee-beneficiaries. 29 U.S.C. §§ 1103, 1104; *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 334, *reh. den.* 453 U.S. 950 (1981). Prior to the enactment of the MPPAA, an employer who withdrew from such a plan and who had made all promised contributions had no further liability unless the plan was terminated within 5 years after his withdrawal. 29 U.S.C. § 1364 (1976 ed.). In that case and that case only, a

withdrawing employer could later become liable for additional contributions up to 30 percent of the employer's net worth. 29 U.S.C. § 1362(b) (1976 ed.). Only employers who qualified as "substantial employers" were required to even furnish security at the time of withdrawal.[3]

However, upon the enactment of MPPAA, employers who had already withdrawn from their multiemployer plans and who had incurred no liability in doing so suddenly became liable for substantial additional contributions to plans to which they had already made all contributions required by their collective bargaining agreements.

The PBGC, in its jurisdictional statement, suggests that employers in

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[3]Gray would not have qualified as a "substantial employer." Moreover, the record in this case establishes that the Trust's financial position had been quite strong and growing stronger during the years prior to Gray's withdrawal. There was and is no reason to believe that it might terminate by 1985.

Gray's position cannot complain because they should have known that the MPPAA would pass and that when it did it would contain a retroactive effective date. The Ninth Circuit, for good reasons, rejected that very argument:

> ". . . . This much-debated legislation went through a variety of forms before its passage. The bill's original effective date was changed as late as June 1980. Congress also extended the effective date of the mandatory guarantee program four times while waiting for the Amendments Act to pass. It would have been impossible for anyone to predict with accuracy the final outcome of the legislative process. The employers therefore relied reasonably upon their collective bargaining agreements with the Unions and the contingent withdrawal liability provisions of ERISA." 705 F.2d at 1511.

No one had cited, nor has any party yet cited, any decision by this court which holds that individuals are bound, at their peril, to conform their conduct to the terms of *proposed* legislation. In fact, this court has recently pointed out the

constitutional significance of *enactment as notice* in regulatory legislation of this kind:

> "Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. There is not even any provision for gradual applicability or grace periods. . . ." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247, *reh. den.* 439 U.S. 886 (1978).
>
> "Compare the gradual applicability of ERISA, which itself is not even mandatory. At the outset ERISA did not go into effect at all until four months after it was enacted. 29 U.S.C. § 1144 (1976 ed.). Funding and vesting requirements were delayed for an additional year. §§ 1086(b), 1061(b)(2) (1976 ed.). By contrast, the Minnesota Act became fully effective the day after its passage. The District Court rejected out of hand the argument that employers were constitutionally entitled to some grace period to adjust their pension planning. . . ."

Id., 438 U.S. at 249, n. 23.[4]

MPPAA's severe disruption of employers' legitimate expectations is not required in order to protect comparable expectations on the part of anyone else. Employee beneficiaries of multiemployer plans were entitled to look to the trusts, not to individual employer-contributors, to provide them with promised benefits. The trustees, in turn, could only have legitimately expected to rely on contributions from current members of the plan (or, if the plan terminated, from

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[4] *Allied Structural Steel* was decided under the Contract Clause. However, substantially the same protection against Congressional impairment of contractual relationships is available under the Due Process Clause of the Fifth Amendment. *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 278 at n. 31 (1969).

Certainly if notice is significant under the Contract Clause, which is an express restriction on substantive power, it should also be significant under the constitutional protection against the deprivation of property without due process of law.

certain recently-withdrawn substantial employers).

Moreover, Congress made no attempt to limit the retroactive application of MPPAA's withdrawal liability to situations in which there was any danger that the employee-beneficiaries' legitimate expectations of the plan might not be met. The substantial (and in some cases massive) withdrawal liabilities were retroactively and automatically imposed without requiring any showing that the plan was likely to be in need of contributions beyond those contracted for, and without any provision to insure that those additional contributions would be applied to reduce the plan's

unfunded vested liabilities.[5]

3. The Consequences of the Retroactive Application of MPPAA Withdrawal Liability Are Harsh and Oppressive.

MPPAA's retroactive imposition of withdrawal liability arbitrarily imposes a substantial liability on a specific group of employers -- those who withdrew from multiemployer plans between April 29, 1980 and September 26, 1980. That additional liability bears no relationship to actual needs of either the plans or their beneficiaries. It is designed to benefit persons who were never employed by those

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[5]Withdrawal liability must be assessed under the MPPAA whether or not the plan needs the funds to remain actuarily sound. Because the trustees have a fiduciary duty to act solely on behalf of the beneficiaries, see p. 10, *supra*, it would be perfectly consistent with the duties of the trustees of a financially healthy plan to use withdrawal liability payments to provide larger benefits rather than to reduce the level of unfunded liability. The trustees might reasonably conclude that their fiduciary duty to the beneficiaries *required* them to do just that.

employers. It is not a recompense for harm resulting from the employers' business activities. Those employers could not avoid the liability by taking steps available after enactment to other employers.

In *Usery v. Turner Elkhorn Mining Co., supra*, 428 U.S. at 18, this court held that liability could be imposed on mine operators whose former employees suffered from black lung disease without violating the Due Process Clause. It said:

> "We find, however, that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor -- the operators and the coal consumers . . . ."

It distinguished *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935), in which a unanimous court had held invalid a retroactive provision of the Railroad Retirement Act of 1934, because:

> ". . . . The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored -- to allocate to the mine operator an actual, measurable cost of his business." 428 U.S. at 19.

This case is not like *Turner Elkhorn Mining*. The employers subjected to retroactive withdrawal liability under MPPAA are not being required simply to assume liability for "disabilities" created by their employment of Trust beneficiaries or to satisfy a "specific need" created by their business. Instead they are required to contribute to the plan's trust fund, without any showing of need, simply to provide a nonspecific supplement to the fund's other income.

Moreover, this imposition of liability is without any "mitigating provisions" comparable to those which have convinced

courts that legislation challenged on similar grounds would pass constitutional muster. Unlike ERISA's provisions for termination liability to single-employer plans, there is no limitation of liability to a percentage of the employer's net worth, no limitation of liability in terms of the vested plan benefits employed as a measurement, and no insurance to protect against withdrawal liability. Those mitigating provisions have been called "perhaps the most important facts distinguishing" ERISA's termination liability provisions from the Minnesota statute held invalid in *Allied Structural Steel Co. v. Spannaus, supra. Nachman Corp. v. Pension Benefit Guaranty Corporation*, 592 F.2d 947, 962 (7th Cir. 1979), quoted with apparent approval in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 367 at n. 12, *reh. den.* 448 U.S. 908 (1980).

Reported instances of withdrawal liability under MPPAA have been substantial and, in some cases, crippling and probably fatal to the employer's business.[6] Whether or not Congress may validly impose such liabilities on employers who withdrew from their multiemployer plans after the enactment of MPPAA, and who therefore at least had notice and the opportunity to consider other alternatives, it can hardly be said that imposing such liabilities on employers who did not have that opportunity is

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[6] *See e.g.*, 127 Cong. Rec. S11629-30 (Oct. 19, 1981 daily ed.), statement of Sen. Hatch ($8 million, exceeding by $4.4 million liquidated employer's remaining assets and $16.6 million, far exceeding company's net worth); *Victor Construction Co. v. Construction Laborers Pension Trust for Southern California*, C. Dist. Calif. No. CV 81-5144-CHH(Gx) ($77,360.94; 26.6 percent of net worth); *Shelter Framing Corp. v. Pension Benefit Guarantee Corp.*, 705 F.2d 1502, 1506 (9th Cir. 1983) ($797,648; approximately 180 percent of net worth); *Id.*, 705 F.2d at 1506 ($687,387; approximately 40 percent of net worth or installment payments of 94 percent of net income in most recent fiscal year).

anything other than harsh. Given the fact that under the terms of the MPPAA the liability must be imposed without regard to either the need of the plan or the responsibility of the individual employer for such need as may exist, it is difficult to see how it could be argued to be anything other than oppressive.

4. Congress Acted Arbitrarily in Making the Withdrawal Liability Provisions of MPPAA Retroactively Effective as of April 29, 1980.

Congress has never explained or justified its decision to apply the MPPAA withdrawal liability retroactively. The Congressional committee reports do not discuss or attempt to explain any provision

for retroactivity.[7] The only hints in the legislative history are references by individual Senators to "opportunistic employers" who might have withdrawn while Congress was considering the bill if it had not carried a retroactivity provision, 126 Cong. Rec. S10156 (July 29, 1980) and to the abandonment of the first-proposed retroactive date of February 27, 1979 because of political pressures from employers who had withdrawn after that date and because it had "served its purpose."

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[7]However, nine members of the House Committee on Education and Labor did express doubts about the validity of the Act's alteration of contracts:

> "There remains the constitutional question of whether by legislation the contract of the employer can be changed from a promise to make certain contributions to a plan to a promise to pay the nonforfeitable pensions under a plan regardless of the inequities, cost. or other consequences to the employer." 1980 U.S. Code Cong. & Adm. News, p. 2988.

Id. at 10101, S10157. No explanation for the April 29 date was offered.

There was never any showing of the actual existence (or number) of such "opportunistic employers" nor any explanation why, if the original effective date had "served its purpose" a substitute period of retroactivity was required. If the employers who withdrew between February 27, 1979 and April 29, 1980 did so for reasons other than opportunism, Congress was offered no basis for assuming that opportunism was any more to be feared thereafter.

CONCLUSION

The Court of Appeals applied appropriate standards of review and correctly concluded that under principles approved by the decisions of this court the MPPAA's retroactive imposition of withdrawal liability violated the Due Process Clause

of the Fifth Amendment. Its decision was correct and should be summarily affirmed.

Respectfully submitted,

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